

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION )	
OF LEWES BOARD OF PUBLIC WORKS )	
FOR A CERTIFICATE OF PUBLIC )	PSC DOCKET NO. 19-0444
CONVENIENCE AND NECESSITY TO )	
PROVIDE WATER SERVICES PURSUANT )	
TO 26 DEL. C. § 203(C) (FILED JULY 9, 2019) )	

**LEWES BOARD OF PUBLIC WORKS ANSWER TO  
CITY OF LEWES PETITION TO INTERVENE**

The Lewes Board of Public Works (“Lewes BPW”) responds to the Petition to Intervene of the City of Lewes (the “City”) as follows:

1. The Lewes BPW Charter referenced within the City’s Petition to Intervene, which was adopted subsequent to the City’s Charter, clearly provides that “[t]he BPW shall have the supervision and control of all utility systems, and private sanitary sewerage, storm water drainage, water, and electric systems, as established or to be established within the Service Area . . . and may cause new facilities for the utility systems to be made and opened.”<sup>1</sup> The Lewes BPW Charter further provides that, “[t]he BPW may cause any such utility systems to be laid, **in its sound discretion**, anywhere within the Service Area . . . in such manner and under such terms and conditions **as the BPW deems proper** and of such material **as the BPW may deem proper** . . . .”<sup>2</sup> Moreover, the Lewes BPW Charter clearly provides that, “[t]he BPW may, **in its discretion, manage and operate**, as the sole provider or in conjunction with any person, firm, association, corporation or entity, one or more utility systems within its Service Area.”<sup>3</sup> Quite simply, the Delaware General Assembly conferred oversight and control over the Lewes BPW utility system

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<sup>1</sup> Board of Public Works of the City of Lewes (Charter) § 4.1.

<sup>2</sup> *Id.* (emphasis added).

<sup>3</sup> *Id.* (emphasis added).

upon the Lewes BPW, “in its sound discretion” and as the “BPW deems proper”, and not upon the City.

2. Because the Delaware General Assembly conferred oversight and control over the Lewes BPW utility system upon the Lewes BPW, the Lewes BPW did not require the City’s consent prior to filing the Application initiating this docket, and the City has no reserved right or ability to prevent the Lewes BPW from obtaining the pending Certificate of Public Convenience and Necessity (“CPCN”).

3. In addition, the City itself concedes in its Comprehensive Development Plan, adopted and approved by the City of Lewes Mayor and City Council on October 16, 2017 and certified by the State of Delaware on February 14, 2018 (excerpts from the “Lewes Comp Plan”, attached hereto as Exhibit “A”), that the Lewes BPW is “[i]n addition to and separate from the City”<sup>4</sup>, and that “only the Board of Public Works can implement recommendations related to electricity, stormwater management, drinking water, and wastewater in Lewes.”<sup>5</sup> Restated, only the Lewes BPW has supervision and control over the Lewes BPW utility system, such that only the Lewes BPW can implement policies and recommendations concerning the Lewes BPW utility system.

4. The Lewes Comp Plan identifies the approximately 52.53-acre property known as the “Mitchell Farm”, comprised of Sussex County Tax Parcel Nos. 335-8.00-37.00 and 335-8.00-37.01, which is the subject of this docket, as within the Lewes Future Annexation Area.<sup>6</sup>

5. As a matter of policy, the Lewes Comp Plan provides, “Lewes will continue to work with the BPW to provide adequate facilities to residents and the proposed annexation area

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<sup>4</sup> Exhibit “A”, p. 8.

<sup>5</sup> Exhibit “A”, p. 14 (emphasis added).

<sup>6</sup> Exhibit “A”, Appendix B: Maps, Map 11.

and will seek to protect its wellfield.”<sup>7</sup> The Lewes Comp Plan further provides that, “Lewes can support the BPW by annexing the wellfields into the City, **as well as supporting BPW’s efforts to consolidate their three CPCNs into a more cohesive area of interest.**”<sup>8</sup>

6. The Lewes BPW Electric Service Area currently includes a portion of Tax Parcel No. 335-8.00-37.00 and the entirety of Tax Parcel No. 335-8.00-37.01. Thus, per the Lewes Comp Plan, the City’s stated policy is to support the Lewes BPW’s efforts in pursuing Applications such as this docket, which will promote a more cohesive and consistent area of interest, particularly within an area specifically identified by the City as of interest for future annexation.

7. As the only party that can implement the Lewes Comp Plan’s recommendations related to utility service per the City’s own admission, the Lewes BPW properly filed the pending Application, which Application advances the Lewes Comp Plan’s recommendations.

8. Moreover, on May 30, 2018, the City of Lewes Mayor and City Council and Lewes BPW Board of Directors met in joint session to discuss issues pertaining to the Mitchell Farm property. During this May 30, 2018 discussion, the Lewes BPW Board of Directors articulated its intent to pursue a Certificate of Public Convenience and Necessity (“CPCN”) for water utility service concerning the Mitchell Farm property. The City did not object.

9. Given the above, the City’s current request to intervene in this docket is perplexing.

10. As the City notes in its Petition to Intervene, the City and Lewes BPW are currently engaged in litigation in the Superior Court for the State of Delaware (Case No. S19C-07-021 ESB) concerning, in part, the City’s claimed authority to direct the BPW concerning the supervision and control of the Lewes BPW utility system. A copy of the Lewes BPW’s First Amended Complaint for Declaratory Judgment is attached hereto as Exhibit “B” (without the exhibits referenced

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<sup>7</sup> Exhibit “A”, p. 14 (emphasis added).

<sup>8</sup> Exhibit “A”, p. 59 (emphasis added).

therein). This pending litigation also concerns the enforceability of a condition for utility service under which a property owner, in exchange for services provided by the Lewes BPW, is required to provide the City with a power of attorney allowing the City to act on the property owner's behalf in any future vote regarding annexation of the property (without any regard to the wishes of the property owner or whether the act is contrary to the property owner's interests) (the "Pre-Annexation Condition").

11. Notwithstanding the Lewes BPW's concerns that the Pre-Annexation Condition may be unenforceable and unlawful, the City has demanded that the Lewes BPW maintain the condition. Because the Lewes BPW intends to have only lawful conditions in connection with the services it provides, the pending litigation was filed.

12. Critically, the Lewes BPW's litigation with the City has no bearing or impact on this matter and the City's assertion otherwise is nothing more than a red herring. The requested CPCN can be granted regardless of whether the City has authority to control or direct the Lewes BPW and regardless of whether the Pre-Annexation Condition is upheld by the Superior Court.

13. The Mitchell Farm property owners have requested water service from the Lewes BPW and the Lewes BPW is prepared and able to provide water service. The Lewes BPW's request for a CPCN is consistent with the statutory and regulatory requirements for a CPCN. Accordingly, the pending Application for a CPCN should be granted as requested.

14. Although the Lewes BPW firmly rejects the City's assertions concerning its authority over the Lewes BPW, and questions the City's interest in filing its Petition to Intervene in this docket, in the interest of fairness to the Mitchell Farm property owners and to avoid undue delay in these proceedings, the Lewes BPW will not object to the City's request to be made a party to this docket. However, the Lewes BPW, for the reasons stated herein, reserves the right to oppose

any argument raised by the City objecting to the Commission granting the requested CPCN as, at the very least, untimely and without merit.

**WHEREFORE**, the Lewes BPW does not object to the City's petition for leave to intervene, but expresses its opposition to the City's claimed bases for intervention and interest in this docket, reserves the right to oppose any objection that may be raised by the City relative to this docket, and requests that the Mitchell Farm CPCN request be placed before the Public Service Commission for decision at the next available date.

Respectfully submitted,

**TARABICOS GROSSO, LLP**

/s/ Michael J. Hoffman  
Michael J. Hoffman (#5349)  
100 W. Commons Boulevard, Suite 415  
New Castle, Delaware 19720  
(302) 757-7811  
mike@tarabicosgrosso.com  
*Counsel for Lewes BPW*

Dated: August 30, 2019

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE**

<b>IN THE MATTER OF THE APPLICATION )</b>	
<b>OF LEWES BOARD OF PUBLIC WORKS )</b>	
<b>FOR A CERTIFICATE OF PUBLIC )</b>	<b>PSC DOCKET NO. 19-0444</b>
<b>CONVENIENCE AND NECESSITY TO )</b>	
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<b>TO 26 DEL. C. § 203(C) (FILED JULY 9, 2019) )</b>	

**VERIFICATION**

I, Darrin E. Gordon, of full age, hereby verify as follows:

I am the General Manager of the Board of Public Works of the City of Lewes ("Board") and I have authority to file the Verified Answer to City of Lewes Petition to Intervene ("Verified Answer") on behalf of the Board.

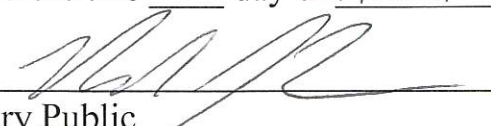
I have reviewed the foregoing Verified Answer and declare that the facts contained therein are true and correct to the best of my information, knowledge and belief upon reasonable inquiry to date.

I certify that the foregoing statements made by me are true. I am aware that if any of the statements made by me are willfully false, I am subject to punishment.

  
Darrin E. Gordon

SWORN TO AND SUBSCRIBED before this 28<sup>th</sup> day of AUGUST, 2019

**MICHAEL J. HOFFMAN**  
**Delaware Attorney at Law with**  
**Power to act as Notary Public**  
**per 29. Del. C. § 4323(a)(3)**

  
\_\_\_\_\_  
Notary Public  
My commission expires: \_\_\_\_\_

## CERTIFICATE OF SERVICE

I hereby certify that this 30th day of August, 2019, I caused a true and correct copy of the foregoing to be served upon the persons listed below in accordance with the requirements of 26

*Del. Admin. C. § 1001-1.6.6.*

### VIA ELECTRONIC MAIL

Renay Edge	renay.edge@state.de.us
Connie McDowell	Connie.McDowell@delaware.gov
Samantha Misner	Samantha.Misner@delaware.gov
Donna Nickerson	Donna.Nickerson@delaware.gov
Thomas Walsh	ThomasD.Walsh@delaware.gov
Thomas P. McGonigle	Thomas.McGonigle@dbr.com

### TARABICOS GROSSO, LLP

/s/ Michael J. Hoffman  
Michael J. Hoffman (#5349)  
100 W. Commons Boulevard, Suite 415  
New Castle, Delaware 19720  
(302) 757-7811  
mike@tarabicosgrosso.com  
*Counsel for Lewes BPW*

# Exhibit “A”



## **PART II. SERVICES AND UTILITIES**

### **A. CITY GOVERNANCE AND SERVICES**

**Governance:** The City is governed by its Mayor and four Councilpersons. The City has 32 full-time, one part-time, and 23 seasonal full-time employees as of August 31, 2015. Its annual budget is approximately \$5.7 million for the fiscal year ending March 31, 2017. The Mayor and Council are generally responsible for the health, safety, and welfare of city residents and for providing such services as trash collection, street repair and sweeping, parks, and police protection.

In addition to and separate from the City is the Lewes Board of Public Works (BPW). The BPW is authorized by an act of the General Assembly under a separate charter to establish, control, and regulate an electric light plant, water works, and sewer system. The BPW has its own board elected by BPW rate-payers and operates on the same fiscal year as the City. More information about the BPW can be found in the next section.

The LPC consists of up to nine appointed members plus four ex-officio members. The ex-officio members are the Mayor, the City Manager, and representatives from City Council and the Board of Public Works. Other officials who often attend are the BPW General Manager, City Solicitor, and Building Official. The LPC reviews land development and subdivision plans and amendments to the zoning ordinance and makes recommendations to City Council. The LPC is also responsible for developing Lewes's comprehensive plan and conducting the public process related to the plan. The Mayor and Council have the final decision-making authority for all land use decisions, including adoption of the comprehensive plan and implementation of its recommendations.

The last comprehensive plan, the City of Lewes Comprehensive Plan, was adopted in 2005 and approved by the State in 2006. Since 2005, approximately ten additional land use studies have been conducted. These studies are listed in Appendix A: Bibliography, and have been incorporated into this Plan as appropriate.

A five-person appointed Board of Adjustment (BOA) hears and decides requests for variances or special use exceptions to the city code. The BOA also serves as a committee to hear appeals to the City's Housing Code. The Mayor and Council hear appeals concerning the Subdivision Code. There are two City officials who generally attend meetings of the BOA: the Building Official and the City Solicitor.

The City also has numerous standing and ad hoc committees that serve in an advisory capacity in dealing with city issues. Those related to land use and planning issues include:

1. Commercial Architectural Review Commission (CARC): Reviews proposals for the exteriors of new commercial construction or changes to existing commercial buildings.
2. Historic Preservation Commission (HPC): Reviews construction, reconstruction, alteration, demolition, and moving of residential structures within the Historic District or historic properties not within the district.
3. Parks & Recreation Commission: Reviews major development plans for open space issues and makes recommendations to the LPC.
4. Greenways & Trails Committee: Works to implement the Lewes Greenways Plan.
5. Lewes Bicycle & Pedestrian Advisory Committee: Recommends pedestrian and bicycle related improvements.
6. Canalfront Park Marina Committee: Makes recommendations to Mayor and Council regarding marina operations, including rate changes and budget needs, as well as policies and procedures.

7. Historic Lewes Byway Committee: Works with DelDOT and Sussex County to implement the Lewes Scenic and Historic Corridor Management Plan (signed by DelDOT Secretary Jennifer Cohan on October 21, 2015). This Committee also works with DelDOT and Delaware Greenways to designate several corridors as Historic Byways.
8. Traffic Safety Management Advisory Committee: Makes recommendations to Mayor and Council regarding street conditions and vehicular traffic issues, including traffic flow, patterns, calming, related safety, signage, speed limits, and general traffic management.
9. Capital Projects Committee: A joint BPW and City Council committee charged with reviewing and overseeing plans for capital improvements in the City.
10. Finance Committee: Reviews and makes recommendations regarding the operation and fiscal standing of City - related to revenue sources and expenses for General Operating Funds and Capital Improvement Projects.
11. Mitigation Planning Team: Established as a result of Project Impact, this group is charged with developing a mitigation strategy that will continue to reduce the City's vulnerability to natural disasters.
12. Board of Health: Created by the City Charter, the BOH has broad powers that could conceivably affect land use and planning issues.
13. Housing Board of Adjustment & Appeals: Hears appeals of the Lewes Housing Code.

According to Section 33(a) of the Charter of the City of Lewes, the City has certain powers over "all the public or vacant lands contiguous to but outside the corporate limits," defined as "fronting on the bay between the point of Cape Henlopen on the south and Veasey's [Roosevelt] Inlet on the north," currently known as Lewes Beach. These lands are subject to the same laws as lands within the City, and Lewes is authorized to, and does, lease these lands to others. Lewes Beach residential leases are for 99 years. While there is no lease fee, other than legal fees, taxes are assessed on both the property and improvements.

Section 33(d) of the Charter also grants the City "full and exclusive authority and control" over the Great and Beach Marshes and the Cape and Cape Marshes owned by the state. It further grants Lewes the authority to sell grass, hay, sand, gravel, wood, and timber from these lands for profit. However, the City may not prevent fishing access to Lewes or Delaware residents along the Delaware Bayshore.

Lewes also leases lands along the Lewes and Rehoboth Canal by agreement with the United States Army Corps of Engineers. All current canal-side leases are set to expire in September 2025. The lease fee is determined according to the amount of road frontage.

In the fiscal year ending on March 31, 2015, the City's total receipts were approximately \$6.9 million. Property tax and real property transfer taxes were approximately 31% and 18% of this amount, respectively. The remaining receipts were generated from gross receipt rental taxes, parking meters, building permits, business and mercantile licenses, grants, donations, traffic tickets, land leases, parking violations, tax penalties, subdivision and zoning fees, reservation fees, and dock rentals. Only the BPW (not the City) has the power to collect impact fees.

Lewes residents enjoy relatively low taxes. The City's tax rate on real property is \$0.57 per \$100 in assessed value and the tax is based on 50% of assessed value as of the City's 2000 assessment. Lewes's citizens also paid \$3.8169 in taxes per \$100 of assessed value to Sussex County in 2015 (totaling school district, county, library, and vo-tech rates) (see <http://www.sussexcountyde.gov/sussex-county-annual-rates>), but these are based on 50% of the County's 1974 assessment.

**Trash Collection, Street sweeping, Snow plowing, and Street Repairs:** The City's Streets Department is responsible for street repairs, street sweeping, and snow plowing on all city streets exclusive of state-maintained roads. The City is currently responsible for 20.06 miles of municipal streets including streets in Savannah Place but not including streets in Canary Creek Subdivision and Highland Acres, none of which have yet been accepted by the City. There are additional streets in Cape Shores, the Jefferson Apartments, Pilot Point, and Port Lewes that the City does not maintain and has not been asked to accept. Routine repairs, plowing, mowing, and sweeping, as well as trash pickup, beach cleaning, signage, and curb painting, are completed in-house by a staff of nine full-time and three seasonal full-time employees. Larger projects are contracted out to private companies. The City provides regular collection of trash, recyclables, and yard waste from all neighborhoods, including those whose streets it is not responsible for, except for the Jefferson Apartments. The City also collects from non-profit organizations, but not from commercial establishments.

**Lewes Police Department:** The City enjoys a very low crime rate. The Lewes Police Department provides around-the-clock police service to Lewes residents. The department employs 17 full-time and seasonal officers as of August 1, 2015, and is fully staffed. Normally two officers are on patrol in vehicles at any given time. Officers have been trained and certified at the Delaware State Police Academy. The police department's operating budget is derived mainly from City revenues, with supplemental funds from various state and federal funding programs. The police department also employs ten seasonal lifeguards and a police dog. The City's parking meter reading staff are also part of the police department.

A public safety issue is encroachment onto public property and right-of-ways. Encroachment in this case is where property owners creep over their property lines by placing garages, trees, gardens, and other items on public property. This has been a particular problem along several streets on Lewes Beach, where emergency responders are unable to get through, and has led to several streets on the beach side of town having been designated as emergency access ways.

## ➤ **COMMUNITY FACILITIES PLAN**

**Policy for Community Facilities:** Lewes will continue to monitor its community services, facilities and structures, and make changes as needed to remain efficient and effective.

**Recommendation:** This Plan recommends that Mayor and Council consider reviewing the function and role of all City boards and commissions.

## **B. LEWES BOARD OF PUBLIC WORKS SERVICE AND UTILITIES**

The Lewes Board of Public Works (BPW) was established in 1901 by a charter separate from the Lewes charter and most recently updated in 2010 and 2015. The BPW is responsible for developing and maintaining mostly underground infrastructure, including electric, stormwater management, drinking water, and wastewater treatment. There are five publicly elected Board members, with officers elected annually by the Board including a President, Vice President, Secretary, Treasurer, and Assistant Treasurer. The Mayor serves in an ex-officio capacity. The BPW also has an ex-officio position on the LPC. The BPW employs 13 full-time and two part-time employees and has a budget of approximately \$13.2 million.

The BPW reviews proposed development plans for utility issues, and collects impact fees for sewer, water and electricity. Impact fees can only be used for capital improvements; increased capacity of assets, or debt on capital improvements, rather than operational or maintenance costs. The BPW does

not have the power of eminent domain (the ability to purchase land for public use through condemnation). Since 2012, owners of lands outside the city limits who desire BPW utilities are required to sign an agreement with the City that provides for annexation of the subject property upon request by the City.

The Delaware Public Service Commission (PSC) issues Certificates of Public Convenience and Necessity (CPCNs) to utility providers in Delaware. CPCNs are issued by the PSC on a first come, first served basis, and define the physical boundaries of a service area. The BPW currently holds CPCNs to provide drinking water, sewer service, and electricity to the entire area within Lewes's boundaries, as well as certain areas outside of the City. Outside of city boundaries, the CPCNs for the three different utilities are not aligned and in some locations do not overlap at all (Map 3: Certificate of Public Convenience and Necessity). In these areas, many property owners may only receive one or two rather than all three utilities from the BPW.

**Electricity:** BPW is an associate member of DEMEC (Delaware Municipal Electric Cooperative), a consortium of Delaware municipalities that generates power for their own usage and manages the portfolio of generation contracts for its members. The makeup of the BPW portfolio has renewable generation sources of wind power from the Laurel Hills Wind farm in Pennsylvania, solar power from the Dover sun farm, and the BPW also receives electricity from the University of Delaware wind turbine located in Lewes. The BPW receives power from the University wind turbine in a virtual net metering agreement where the BPW purchases the electricity that is generated above the needs of the University. The City is one of the nation's highest per capita areas of home solar installations. The BPW's distribution system currently has one substation within the city limits. The entire distribution system was upgraded to 12 kilovolts, and the carrying capacity of the system is now 45 megawatts. Since the long-range plan for electricity was last updated in 2005, the BPW has been implementing the recommendations to bring service upgrades on line to meet the projected growth. As a result, the BPW currently estimates that only about 60 percent of the currently available electrical capacity is being used at this time, with plenty of remaining capacity to serve future growth.

**Stormwater Management:** The citywide stormwater system, managed by the BPW, is composed of pipes, curbs, and gutters and about 900 storm drains. The majority of the system has been in place for many years. As a result, the stormwater management system drains untreated into the Canal, local streams, private catchments, or bioswales. During high tide periods, the system prevents tidal backflow by using strategic flap gates and other control structures and devices. It is essential to diligently maintain this system, keeping drainage ways clear of debris, sedimentation, and other materials that block or reduce flow.

The maintenance of ditches, retention ponds, and bioswales on private property is the responsibility of individual property owners or of homeowners associations. There is also a private system of tax ditches in Lewes that is maintained by the Highland Acres Tax Ditch incorporated for that purpose. The BPW will notify appropriate officials if it observes problems with these private structures, but has no authority over them.

All new major development in Lewes is required to include on-site stormwater management techniques to manage both water quantity and quality, which are the responsibility of each homeowner's association to maintain. When possible, minor subdivisions are sometimes allowed to tie into the existing city system. Both the BPW and the Sussex Conservation District review all development proposals for stormwater management issues.

In 2015, the BPW completed a Stormwater Management Plan recognizing stormwater management as a utility. The Plan includes recommendations for possible uses of green technologies, prioritization of needed repairs, and a maintenance plan for storm pipes.

**Drinking Water:** Drinking water is pumped from a city-owned well field with five production wells located southwest of Cape Henlopen High School, outside city limits. There are approximately an additional 18 private wells that withdraw water from the same aquifer. In addition to the entire city limits, water is also provided to Cape Henlopen State Park, the high school, Wolfe Runne, and Wolfe Pointe. The Board has agreed to provide water also to Showfield.

The City's five wells draw water from the Columbia aquifer, classified by DNREC as "unconfined" -- close to the land surface and directly subject to precipitation and temperature. Because it is unconfined, the aquifer is susceptible to contamination from various sources at or below ground level, including sewage, animal waste, fertilizers, pesticides, commercial and industrial wastes and spills, and de-icing salts. In addition, saltwater intrusion is also a possibility, but difficult to predict. The BPW utilizes three test wells located between the bay and the city wellfield, which are monitored for saltwater intrusion.

In November 2013, the BPW opened a new water treatment plant located at the wellfield on Kings Highway and decommissioned the old treatment plant at the Schley Avenue site. It is anticipated that this new plant will serve the City's water treatment needs for the next 20 years. Lime, fluoride, and chlorine are added to the drinking water to meet state quality standards. A new standby diesel generator at the wellfield allows for emergency pumping from all five wells at the same time, if needed.

The wells are capable of producing at least four million gallons-per-day (gpd), with the 1951 storage tank having a capacity of 300,000 gallons. The City averages about 800,000 gpd during the off-season, and usage peaks at 1.6 million gpd during the summer, with about 460,000 gpd identified as being used for lawn and garden irrigation. Major industrial and commercial users including SPI Pharma and Beebe Healthcare use approximately 540,000 gpd on average. With the current pumping and distribution capacity, the BPW estimates that about 60 percent of available capacity is being used, leaving about 40 percent of capacity available for new customers.

The BPW has a ten-year plan for drinking water, *Lewes Water System Study*, which was updated by George, Miles & Buhr, LLC, in December 2010. The study called for the BPW to apply for a CPCN for the area approximately located between the existing city border and Black Hog Gut bordered by the railroad tracks to the south. Tidewater Utilities holds CPCNs for other nearby areas south of the town and along SR 1.

This new area plus existing developments was projected to require 22,810 gpd to serve an additional 1,060 homes. Usage rates were estimated at 210 gpd per EDU (Equivalent Dwelling Units). Overall, the 2010 study planned for a total of 3,310 EDUs with an equivalent usage of 695,100 gpd. Total required flow for the Lewes area was projected to be 2.3MGD with a peak flow of 4.13 MGD.

Although a new well is not needed at this time, the study identifies a target location for a new well on New Road in the vicinity of the entrance to the University of Delaware property. The study recommended the addition of a second 500,000 tank in the same New Road location as the proposed new wellfield. Finally, the study identifies a number of proposed improvements to the water infrastructure within the 2010 and proposed new CPCN area, which the BPW has been working to bring online as needed.

**Wastewater:** The BPW provides wastewater service only to properties within the city limits, except the Cape Henlopen High School, University of Delaware housing, First Baptist Church, and the P. Rodney Cunningham strip mall.

The original collection system was designed to handle both wastewater and stormwater. During the 1980s, the stormwater was removed, leaving the sewer pipes sized to handle additional growth. Untreated wastewater is pumped to the Wastewater Treatment Plant (WWTP) using a series of pump stations located throughout the town. Impact fees and developer agreements are being used to assist with funding the costs of adding new infrastructure as needed.

The BPW has a twenty-year plan for wastewater, *Lewes Sanitary Sewer Study*, which was completed by George, Miles & Buhr, LLC, in July 2007 and updated in 2015. The BPW has wastewater treatment capacity for an average daily flow rate of 1,500,000 gpd. Average flows in the wintertime are approximately 535,000 gpd; however, summertime flows commonly peak above 1,000,000 gpd.

The City of Lewes Howard Seymour Water Reclamation Plant (WWTP), opened in 1961 and rebuilt and expanded in 2008, is on American Legion Road near Lewes Beach. Approximately 30 pumping stations throughout the City pump wastewater to the treatment plant. The pumps are powered by electricity, with some also equipped with back-up generators. The BPW has contracted with Severn Trent to operate the treatment plant through December 2016. Treated wastewater is currently released into the Lewes and Rehoboth Canal, almost all of which flows into the Delaware Bay.

The BPW, in coordination with DNREC, is required to eliminate an agreed upon amount of nutrients from WWTP discharges entering the Rehoboth Bay, in order to meet the nutrient trade requirements of the Lewes BPW NPDES permit. In 2008, the BPW upgraded and expanded the wastewater treatment facility so that nitrogen concentrations in the facility's effluent stream are reduced to less than or equal to 5 milligrams per liter (mg/l) and phosphorus to less than or equal to 0.6 mg/l. The upgraded treatment facility utilizes a membrane filtration system combined with a nutrient removal system to achieve the best effluent results. The BPW also moved 330 tons of chicken manure out of the Lewes-Rehoboth watershed to meet the NPDES requirements for many years to come, and will continue to do so as needed.

The WWTP is located in the floodplain between the Delaware Bay and the Lewes and Rehoboth Canal off of Savannah Road. According to the 1999 Greenhorne and O'Mara Flood Mitigation Plan and quoted in the 2011 Hazard Mitigation and Climate Change Adaptation Action Plan:

*"Potential damage to this facility poses a serious risk to the community. Access to this structure would likely be cut-off during a 100-year event. Damage to the facility could cause a break in service, which would affect all residents and shelters as well as emergency operations [services] at the Beebe Medical Center. Furthermore, flood damage could result in a failure at the plant that might lead to an overflow of the plants' contents, resulting in a serious health risk to the community." (pg. 41)*

The BPW has had the WWTP evaluated and an elevation certificate was issued showing the plant to have nine feet of freeboard above the 100-year floodplain level. The highest flood experienced to date only reached three to four feet above 100-year floodplain. In the event of the access road being flooded, the BPW has a plan for critical staff to access the WWTP by boat.

The BPW estimates that, with recent upgrades, only about 70 percent of currently available sewer capacity is being used, leaving about 30 percent available for new customers in the CPCN. Sussex County also serves a portion of the lands outside the city limits and has allocated capacity to serve up to four residential units per acre with some commercial development. In addition, some properties just

outside the city limits are not located within a sewer service area and are therefore still dependent on septic systems.

## ➤ UTILITY PLAN

**Position on Key Infrastructure Issues:** Lewes continues to work with the Board of Public Works to provide adequate infrastructure to residents and to the proposed annexation area. Lewes supports context sensitive transportation improvements to improve safety and flood evacuation.

**Policy for Adequate Water and Waste Water Systems:** Lewes will continue to work with the BPW to provide adequate facilities to residents and the proposed annexation area and will seek to protect its wellfield. Only the Board of Public Works can implement recommendations related to electricity, stormwater management, drinking water, and wastewater in Lewes.

## C. COMMUNITY AND OTHER GOVERNMENT PROVIDED SERVICES

**Police:** Delaware State Police Troop 7 provides back-up to the City and is located about two miles away on SR 1, although it plans to move its headquarters further inland. The Lewes Police and the State Police enjoy a strong and cooperative relationship. Additionally, University of Delaware police from the Hugh R. Sharp Campus and Delaware River and Bay Authority police from the Cape May-Lewes Ferry also provide back-up support to Lewes police as needed, and vice versa.

**Fire, Ambulance, Paramedic:** The Lewes Volunteer Fire Department, founded in 1796, operates out of the Fire Station 1 located at 347 Savannah Road. The department serves a wide geographic area, extending approximately eight miles south and west of the City. In addition to the headquarters, there are two substations, Substation 2 at Nassau and Substation 3 operating out of a building shared with Rehoboth Beach Volunteer Fire Company, located at Angola on Route 24, about five miles southwest of SR 1. The three stations house five ambulances operated by the fire department. Currently, the Lewes Volunteer Fire Department has over 150 members. In addition, there are thirteen full-time paid employees, who are primarily responsible for ambulance runs. The Lewes Fire Department receives funding from Lewes, the BPW, Sussex County, and the state, but the majority of funds come from donations from the corporate sector and from individuals in the community. Paramedic (EMS) service is also provided by Sussex County.

**Education:** Lewes is part of the Cape Henlopen School District. Three Cape District schools are located within the City boundaries. Richard A. Shields Elementary School (K-5) and the Lewes School are located at the intersection of Savannah Road and Sussex Drive. The Lewes School houses both the Sussex Consortium Program (K-12) for students with special needs and the Little Viking Learning Center. The Frederick Thomas School, formerly the school for African American students in the Lewes area, is located on Dupont Avenue and is occupied partly by offices of the Cape Henlopen School District and partly by the Osher Lifelong Learning Institute. Cape Henlopen High School and the main Cape Henlopen School District offices are located on Kings Highway, just outside of the City and adjacent to the City's well-field.

Additional educational centers in Lewes include the Margaret H. Rollins School of Nursing, part of Beebe Healthcare, and the University of Delaware College of Earth, Ocean and Environment campus. The University of Delaware also supports the Osher Lifelong Learning Institute.

**Senior Services:** Even though, as previously noted, Lewes is a destination for retirees, there is no senior center or CHEER Center located within the City limits. However, the Harbour Lights CHEER Center and the Lewes Senior Center are both located just outside the City. The CHEER Center, located adjacent to senior housing near Carpenter's Corner, offers weekday lunches, programs and a fitness center. Transportation for medical appointments and grocery shopping is available. The Lewes Senior Center is across Route 1 in the Nassau area and offers similar services to its members.

**Social Services:** The nearest State Service Center is located in Georgetown, about fifteen miles away. This full-service center offers a host of client services such as Medicaid, Food Stamps, long-term care assistance, utility assistance, rental assistance, and the Foster Grandparent Program. The state is currently considering a proposal to move this Service Center closer to the beach. The nearest federal Social Security Center is located on Old Vine Boulevard in Nassau.

**Library:** The Lewes Public Library, established in the early twentieth century, is currently located at 111 Adams Street on Kings Highway and operated by a nonprofit, Lewes Public Library Inc. An independently operated library, it has many partners and is run in compliance with the Sussex County Department of Libraries and the Delaware Division of Libraries. The state and county provide some funding, whereas the City of Lewes owns and maintains the building and land. The library currently has a staff of five full-time and 10 part-time employees who are assisted by almost 100 volunteers working 20 volunteer hours each day.

The current two story, 14,000 square foot, library building houses more than 55,000 books. In 2014, the library reported that it had approximately 145,000 visitors, averaging 500 a day, and nearly 12,000 registered borrowers and participates in a statewide interlibrary loan program. The library is connected to the Internet and currently has a modest number of computers for use by members. Two meeting rooms are available to the public.

The library has outgrown its current facility and is in the process of building a 28,000 square foot building on a tract of land adjacent to the current facility and Stango Park. The new location is across the railroad tracks from the current library and will be connected via an extension of Adams Ave. It is expected to open in the late spring of 2016. This major effort has received financial support from the State Division of Libraries, Sussex County, the City, DNREC, DelDOT, the general public, and others. This tract will also include a trailhead and a portion of the Georgetown-to-Lewes Rail with Trail.

**Postal Service:** Postal services for Lewes and environs are provided via the Lewes Post Office in downtown Lewes with a smaller satellite office located near Five Points in Nassau. The regional sorting station is at Rehoboth Beach.



## **PART VI: MOVING FORWARD**

### **A. IMPLEMENTATION**

The City of Lewes has a number of tools at its disposal to implement the recommendations discussed in this Plan. A number of the recommendations may require changes to the Subdivision Code, Zoning Code or other laws and ordinances of the City of Lewes – these are outlined in Section B. Several of the land use recommendations may require changes of the Zoning Map in order to implement. The City may be able to accomplish some of the recommendations through partnerships with other agencies and organizations – these opportunities are discussed in more detail in Section C. For many of the recommendations in this document, implementation requires finding and allocating substantial sums of money well beyond the City’s current fiscal capacity.

### **B. ZONING CODE AND MAP REVISIONS**

Within 18 months from the date of adoption of this Plan the City will make changes to the Zoning Map to bring it into agreement with this document.

### **C. INTERGOVERNMENTAL COORDINATION STRATEGY**

The City of Lewes Mayor, Council, and Planning Commission will require assistance and coordination from many other agencies and organizations to successfully implement many of the recommendations outlined in this Plan. The City and BPW are already working with many of these agencies on many of these issues and will need to continue as well as expand those efforts. Some of the agencies and organizations whose support will be needed include:

**Board of Public Works of the City of Lewes (BPW):** BPW is another government entity in the City of Lewes; it has a different funding mechanism. BPW can collect impact fees, which cover the capital costs of providing service. Lewes and BPW maintain a good working relationship.

There are a number of issues identified within this Plan where coordination and cooperation is needed for the good of the community. Issues related to land use planning and development include better coordination with BPW to provide incentives for the right kind of development. Lewes can support the BPW by annexing the wellfields into the City, as well as supporting BPW’s efforts to consolidate their three CPCNs into a more cohesive area of interest.

Since storm water management is within the purview of BPW, Lewes supports BPW in addressing the flooding issues outlined in this Plan, the Hazard Mitigation Report and the Quinn Report. Lewes can also assist BPW in applying best practices to new and redevelopment, finding and acquiring land for stormwater projects if needed, and possibly helping with enforcement of stormwater maintenance of facilities that are not under BPW control. Both BPW and Lewes need to work together on public education efforts and emergency planning related to flooding and stormwater management.

**Sussex County:** Development in Sussex County has increased City costs and threatens drinking water quality and quantity. The coastal area is a major economic driver for Sussex County and what happens to this area in future years has the potential to greatly affect the County. Sussex has begun to recognize this relationship with the adoption of their ESDDOZ regulations, but more cooperation with the County is needed.

The biggest issue of concern to Lewes is the need for regional planning and coordination. Planning issues include zoning and land use, better protection of the water recharge areas and other environmental resources, transportation congestion and gateways into town. The entire coastal area, including Sussex County and the other coastal towns needs to educate residents and visitors with respect to flooding, development best practices, sea-level rise and emergency planning. Although this could be done as an individual effort by Lewes and for Lewes, public education would be much more effective and efficient if all the local governments joined together in this effort.

**State of Delaware:** Delaware has a number of different agencies that can provide assistance in addition to the General Assembly. Lewes and BPW already coordinate with many of these agencies on a number of issues, but should continue to actively seek out partnerships in order to accomplish the best outcomes.

- **The Delaware General Assembly:** Lewes area Representatives and Senators can provide funding for transportation and trails programs through the capital budget as well as funding assistance for individual projects using legislator discretionary funds. Also, Lewes and other local governments need state-level funding and support for regional planning, clean water, flooding and sea-level rise education and initiatives. Specific laws include changes to Delaware's real estate disclosure laws to provide information related to flooding and sea-level rise.
- **Office of State Planning Coordination (OSPC):** Provide assistance and leadership in bringing the parties together for regional planning in the coastal area.
- **Delaware Department of Transportation (DelDOT):** Assistance is needed in developing and implementing a regional transportation plan including multi-modal improvements, gateways, signage, and context sensitive street designs. Improvements to evacuation routes are a major concern due to flooding making them impassable in several locations. Lewes can use information related to Transportation Enhancements and other sources of funding for bicycle and pedestrian facilities, as well as information related to appropriate street dimensions, bicycle facility design standards, Transportation Improvement Districts (TID), and the possibility of adapting the TMP parking app for city use. DART First State coordination and assistance would focus on transit service and appropriately located and designed shelters.
- **Department of Natural Resources and Environmental Control (DNREC):** Assistance is needed for trail development and funding, as well as trail signage and information regarding off-road trail design standards. Support and coordination will be needed to increase recreational access to Beach Plum Island and the Greenhill Light site. Lewes and BPW may also require coordination and technical assistance regarding the implementation of wetland and riparian buffers, as well as public education regarding safe bicycling, and issues related to flooding.
- **Delaware State Housing Authority (DSHA):** Can provide technical assistance and resources related to affordable housing issues, including research on best practices related to Cohousing, and model code language for accessory dwelling units.
- **Delaware Emergency Management Agency (DEMA):** Provide technical assistance and funding related to flooding and sea-level rise, including improvements to evacuation routes, emergency planning, and public information.

- **Delaware Economic Development Office (DEDO):** Provide assistance and support for regional planning as well as coastal initiatives related to flooding and sea-level rise in order to preserve the economy of the coastal area.

**Federal Government:** In addition to advocating with the congressional delegation to provide funding for all forms of transportation, and flooding and sea-level rise initiatives, Lewes needs to continue to seek out assistance and coordination from several other Federal agencies:

- **Federal Emergency Management Agency (FEMA) and National Flood Insurance Program (NFIP):** Provide assistance and funding for improvements to evacuation routes and assistance with flooding and sea-level rise initiatives.
- **United States Army Corps of Engineers (USACE):** Provide assistance and coordination on Canal-related initiatives including flooding and water quality. They also regulate certain types of wetlands.
- **United States Geological Service (USGS):** Provide technical assistance and information related to aquifer monitoring for saltwater intrusion and flooding initiatives.
- **National Park Service (NPS):** Coordinate management of the First State National Historic Monument.

**Quasi-governmental organizations:**

- **Delaware River and Bay Authority (DRBA):** Provide assistance and coordination related to Freeman Highway pedestrian crossings and multimodal facilities, as well as the City's gateways. Other issues for coordination include bicycle and pedestrian safety improvements on Cape Henlopen Drive from Lewes Beach to the park, and DRBA shuttle coordination. Lewes may need to seek the assistance of its State legislators for best results.
- **Cape Henlopen School District (CHSD):** Coordinate and communicate information related to all area school properties including Blockhouse Pond, and cooperation related to annexation of the high school and city wellfields.
- **University of Delaware Sustainable Coastal Communities Initiative:** May be able to provide assistance with flooding and sea-level rise technical issues, such as coastal zone resiliency, and public education. The SCCI can also continue to support regional planning issues.
- **University of Delaware T<sup>2</sup> Institute:** May be able to provide information and training regarding the ADA Transition Plan and other transportation issues.
- **Sussex Conservation District (SCD) and Natural Resources Conservation Service (NRCS):** May be able to provide technical and funding assistance for flooding and sea-level rise issues, projects and implementation. The SCD also has the authority to regulate stormwater management.
- **Sussex County Cooperative Extension Service:** Sometimes provides assistance with public education.

**Non-Government Organizations:** There are a number of other local organizations that may advocate or be able to provide assistance and serve as partners in accessing other sources of funding. Some to consider include:

- **The Delaware Nature Society:** May be able to provide assistance with Community Habitat certification including public education, and is a possible partner for grants related to flooding and sea-level rise.
- **Lewes Chamber of Commerce:** Market Lewes events and attractions.
- **Greater Lewes Foundation:** Possible assistance with fundraising and general support.
- **Delaware Greenways:** Support for transportation improvements, and possible assistance with grant writing and fundraising.
- **Lewes in Bloom:** Possible assistance with public education and fundraising.

- **Delaware Center for the Inland Bays:** May be able to provide assistance with public education, and a possible partner for grants related to flooding and sea-level rise.
- **Sussex County Association of Towns (SCAT):** Provide support for legislative initiatives and regional coordination.
- **Delaware League of Local Governments (DLLG):** Provide support for legislative initiatives and regional coordination.
- **Greater Lewes Community Village:** May be a possible source of support for housing ordinances and assistance with senior issues.



# Exhibit “B”





**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

BOARD OF PUBLIC WORKS  
OF THE CITY OF LEWES,

Plaintiff,

v.

CITY OF LEWES,

Defendant.

Case No. S19C-07-021 ESB

**VERIFIED FIRST AMENDED COMPLAINT  
FOR DECLARATORY JUDGMENT**

Plaintiff, the Board of Public Works of the City of Lewes ("Plaintiff" or "Board"), by and through its undersigned counsel, alleges for its First Amended Complaint for Declaratory Judgment, as follows:<sup>1</sup>

**INTRODUCTION**

1. The Board seeks a declaration as to the permissibility of certain restrictions imposed by Defendant, the City of Lewes ("Defendant" or "City"), on

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<sup>1</sup> This Verified First Amended Complaint for Declaratory Judgment amends the Complaint for Declaratory Judgment ("Complaint"), which was filed on July 17, 2019. (Dkt. No. 1). A redline reflecting the changes from the Complaint is attached hereto as Exhibit 1. On August 21, 2019, the parties agreed by stipulation to extend Defendant's time to answer the Complaint. (Dkt. No. 5). The Court ordered Defendant to respond on the later of the date ordered by the Court, if the Court grants Defendants' Motion for Leave to Present Briefing on its Motion to Dismiss ("Motion for Leave"), or within 7 days of the date the Court denies the Motion for Leave. (Dkt. No. 6).

the Board's ability to provide important and essential services, facilities, and infrastructure to property owners within the Board's service area. Specifically, the City requires a property owner who seeks utility services from the Board to agree to the annexation of the property owner's property by the City before the Board may provide utility services to the property. This restriction impermissibly constrains the Board's ability to perform its critical role to provide utility services to property owners within its service area but outside the City and is an unlawful condition to the Board's provision of utility services. The Board seeks relief from this Court from the restrictions imposed by the City so that the Board may fulfill its purpose as directed by the General Assembly of the State of Delaware (the "General Assembly").

### **PARTIES**

2. The Board, a separately chartered entity, was established in March 1901 through an Act of the General Assembly that granted Plaintiff the authority, responsibility, supervision, and control of utility systems established or to be established within the Board's service area ("Service Area"). Plaintiff has independent authority over the Service Area. The Board's Service Area is defined by the Board's Charter ("Board's Charter" or "Charter").

3. The City, an entity separate from the Board, is a municipality founded in 1631, incorporated by an act of the General Assembly on February 2, 1818, and



located in Sussex County, State of Delaware. The City is within the Board's Service Area, but the Service Area includes areas outside the City and the City's jurisdiction.

### **JURISDICTION AND VENUE**

4. Jurisdiction is proper in this Court under 10 *Del. C.* § 6501.

5. Venue lies before the Superior Court of the State of Delaware because Plaintiff seeks a declaration concerning certain regulations impacting the Board, the City, and landowners within the Service Area.

### **BACKGROUND**

#### **A. The Board's Authority**

6. The General Assembly set forth the authority, duties, and responsibilities of the Board in the Board's Charter. Under the Charter, the Board is "authorized to continue, subject to the jurisdiction, authority and responsibilities provided by [the] Charter, to establish, to control, and to regulate Utility Systems . . . and other future additional systems and utilities which may be established for the City of Lewes." Charter, Preamble. The Charter further provides that the Board "may cause any such utility systems to be laid, in its sound discretion, anywhere within the Service Area . . . in such manner and under such terms as the [Board] deems proper and of such material as the [Board] may deem proper . . . ." *Id.* at § 4.1. The Board is also empowered to adopt such rules and regulations as it deems proper. *See id.* at §§ 4.10; 4.20.

7. The Service Area is defined as “the corporate limits of the City of Lewes, the territory beyond such limits authorized in [the Charter], and any franchised service area.” Charter, § 1(6). Section 4.20 expands the Service Area to include properties located within two miles of the corporate limits of the City or “extended under such terms and conditions as the Board shall deem proper.” *Id.* at § 4.20.

8. The City of Lewes Comprehensive Development Plan (“Comprehensive Plan”) also acknowledges the Board’s independence from the City concerning authority over utilities in the Service Area. A true and correct copy of the Comprehensive Plan is attached hereto as Exhibit A. The Comprehensive Plan was adopted by the Mayor and Lewes City Council on October 16, 2017. The Comprehensive Plan was certified by the State of Delaware on February 14, 2018.

9. The Comprehensive Plan describes the governance of services and utilities as follows: “In addition to and separate from the City is the Lewes Board of Public Works (BPW). The BPW is authorized by an act of the General Assembly under a separate charter to establish, control, and regulate an electric light plan, water works, and sewer system. The BPW has its own board elected by BPW rate-payers and operates on the same fiscal year as the City.” Ex. A, p. 8.

10. The Comprehensive Plan also addresses the relationship between the City and the Board with respect to annexation. “Lewes continues to work with the

Board of Public Works to provide adequate infrastructure to residents and to the proposed annexation area.” Ex. A, p. 14. “Lewes will continue to work with the BPW to provide adequate facilities to residents and the proposed annexation area and will seek to protect its wellfield. **Only the Board of Public Works can implement recommendations related to electricity, stormwater management, drinking water, and wastewater in Lewes.**” Ex. A, p. 14 (emphasis added).

11. In short, the Board is the steward of the utility systems within its Service Area and, accordingly, takes care to ensure that current and future customers have access to safe, reliable, and affordable services. The Board intends to have only lawful conditions in connection with the services it provides.

**B. The Board and the City Are Separate Entities**

12. The Board is a separate and distinct entity from the City. As a matter of law, municipal agencies can sue and be sued only if they are separate legal entities from their municipality. The Board can sue and be sued in its own right. *See, e.g.*, Board Charter, § 7.1 (“The BPW shall indemnify, from the general funds of its treasury, to the extent not otherwise covered by the appropriate insurance, any person who is a party to or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigate (other than an action by or in the right of the BPW itself). . . .”). The Board has been a party to litigation that does not involve the City. *See, e.g., Bd. of*

*Public Works v. Greener*, 2005 WL 1249039 (Del. Super. Ct. May 25, 2005); *Barcroft Co. v. Bd. of Public Works of the Town of Lewes*, 1980 WL 81867 (Del. Ch. Mar. 11, 1980). Accordingly, as a matter of law, the Board is a separate legal entity from the City.

13. The Board's governance reflects its independence from the City. As noted above, the Board has its own Charter that was adopted by the General Assembly. Under the Charter, the Board is composed of five elected directors and one ex-officio person appointed by the Mayor of the City. Charter, § 2.1. Each Director serves for three years. *Id.* The directors are elected from all ratepayers within the Service Area, which includes areas outside of the City. The Mayor has an ex-officio seat on the Board's Board of Directors ("Board of Directors"), but that seat does not have voting power.

14. The Board's financial management is separate from the City. The Board maintains its own bank accounts and books and records. The City does not have access to or authorization over the Board's bank accounts. The Board has the authority, under the Charter, to borrow funds in its own name. Charter, § 4.14. The Board of Directors manages the Board's revenues. The Board contributes 5% of its revenues to the City in lieu of a franchise fee. Additionally, the Board's auditors conduct reviews and issue reports for the Board, which the Board of Directors reviews and approves. The City Council does not approve or otherwise take action

on the audit and has no input in the preparation of the audit. The Board provides a copy of its annual audit to the City Council for informational purposes. Additionally, the Board has its own EIN and tax exemption numbers.

15. The Board's work in the local community demonstrates its independence from the City. The Board is integrally involved in local administration within its Service Area. For example, the Board has an ex-officio seat on Lewes's Planning Commission. Pursuant to the Planning Commission Bylaws, the ex-officio seat does not have the right to vote. Additionally, the Board and the City make separate contributions to the Lewes Fire Department.

16. The Board's day-to-day administration similarly reflects its independence. The Board leases its office space in the City of Lewes Municipal Building. Additionally, the Board is responsible for maintaining its computer, software, and other operational systems. All software used by the Board is licensed in the name of the Board and does not include the City. The Board has its own information technology personnel, consultants, and vendors to maintain its technology systems. The Board and the City use different systems, maintain separate servers, have separate websites, and use different IT personnel and vendors. The only shared system between the Board and the City is called a "Code Red" public notification system, and even with respect to this shared system, the Board and the City maintain separate databases.

17. All Board vehicles and other personal property are owned by the Board. The Board also maintains insurance on its property and does not list the City as an additional insured on the relevant policies. The Board and the City jointly own the real property on which utility lines are located.

18. The City cannot use the Board's property, services, or other information without authorization or compensation. For example, the City and the Board recently entered into an agreement whereby the City makes improvements to certain Board property, and the Board must compensate the City if the property is returned to the Board. Additionally, the City pays the Board for utility services. Further, the City cannot access the Board's records regarding customer information, and the Board does not share customer information with the City.

19. The Board's other insurance policies similarly are separate from the City's insurance coverage. The City is insured through the State of Delaware's insurance coverage. By contrast, the Board carries a separate general liability insurance policy through Selective Insurance. The City is not listed as an additional insured on the Board's liability insurance. The Board also maintains its own worker's compensation insurance policy.

20. The Board manages its own employees. Board employees do not report to the City Manager or the City Council. The Board has its own personnel policies (including an employee handbook) that are not reviewed, revised, or impacted by

the City Manager or City Council. The Board independently posts job listings, conducts interviews, and performs employee onboarding in the Board's offices. All training is conducted in house by either the employee's supervisor or another authorized Board representative. City and Board employees occasionally will receive joint training through the State of Delaware.

21. Board employees enjoy a different compensation structure than that provided to City employees; specifically, Board employees receive merit- and performance-based pay raises, as opposed to the lockstep pay raises that City employees receive. The Board of Directors approves the budget for all employee raises and other compensation. Payroll is made through a payroll company; the Board uses a different payroll company than the City. The Board and the City maintain separate employee health and life insurance plans and separate employee retirement and defined benefit plans. Employee reviews and evaluations are conducted by the employee's supervisor. The Board makes its own determinations regarding employee discipline and termination. The City does not have any input into employee compensation, benefits, hiring, termination, or training for the Board's employees.

22. Both as a matter of law and as a practical matter, the Board is a separate legal entity from the City. The Board has a vested interest in protecting its hegemony against incursion by the City.

### **C. Pre-Annexation Agreement Policy**

23. As noted above, the Charter empowers the Board to adopt rules and regulations “in order to supply utilities or regulate the connection and/or access of public utility services or facilities by owners or lessees of abutting properties.” Charter, § 4.10.

24. On March 27, 2007, the Board adopted Resolution No. 07-002 (“Resolution No. 07-002”) titled “A Resolution of the Board of Public Works of the City of Lewes to Establish a Procedure for Application for Utility Services for Areas Beyond the Limits of the City of Lewes.”

25. Resolution No. 07-002 continues a procedure whereby an owner of a property that is located outside of City limits but within the Service Area may obtain Board-provided utility services only if the property owner executes an agreement (“Pre-Annexation Agreement”) allowing the City to annex the property if and when the City so decided. Under the agreement, the property owner is required in exchange for services provided by the Board to provide the City with a power of attorney allowing the City to act on the property owner’s behalf in any future vote regarding annexation of the property (without any regard to the wishes of the property owner or whether the act is contrary to the property owner’s interests).

26. Six years later, on December 4, 2013, the Board adopted Resolution No. 13-004 (“Resolution No. 13-004”) titled “A Resolution of the Board of Public



Works of the City of Lewes, Delaware to Amend the Procedure for Application for Utility Services for Areas Beyond the Limits of the City of Lewes.” A true and correct copy of Resolution No. 13-004 is attached hereto as Exhibit B. Resolution No. 13-004 slightly modifies the procedure set forth in Resolution No. 07-002, but does not disturb the requirement that a property owner must enter into a Pre-Annexation Agreement in order to obtain Board-supplied utility services.

**D. The City Opposes the Board’s Decision to Abandon the Pre-Annexation Agreement Policy**

27. The Board has recently expressed concern regarding the Pre-Annexation Agreement requirement. On October 27, 2016, the current City Solicitor for the City of Lewes, Glenn C. Mandalas, Esq., acting at the time in his capacity as counsel to the Board, wrote a memorandum (“Mandalas Memorandum”) to the Board of Directors for the Board providing a legal review of the policy adopted by Resolution No. 13-004. A true and correct copy of the Mandalas Memorandum is attached hereto as Exhibit C. *The Mandalas Memorandum expresses doubt as to whether the imposition of an annexation requirement would withstand judicial scrutiny. See id.* at p. 4.

28. In the Mandalas Memorandum, the City Solicitor states that “There is no question that the BPW has the right to provide water service to areas outside of the City’s corporate limits. Indeed, the BPW essentially has an exclusive franchise

to provide such service . . . .” Ex. C, p. 2. Moreover, the Board “holds a duty to provide service absent a valid ‘utility-related’ reason. *Id.* at p. 4. The memorandum continues, “a decision by the BPW to waive an annexation requirement for one property would likely undermine future application of the annexation requirement.” *Id.* at p. 4. Accordingly, the memorandum concludes, “Whether annexation is a valid utility-related reason will largely depend on the court’s interpretation of the relevant facts.” *Id.* Thus, the City Solicitor doubted whether the annexation condition was enforceable.

29. The Board recently signaled its intention to completely abandon the Pre-Annexation Agreement policy as it believes it is unenforceable and unlawful. The Board’s decision was based in part on the City Solicitor’s Memorandum. The City objected.

30. Given the City’s concern, the Board deferred action to abandon the Pre-Annexation Agreement requirement and opted to instead consider requests from affected property owners for a waiver from the Pre-Annexation Agreement requirement on a case by case basis.

31. In early 2018, a property owner of certain real property comprising approximately 3.2 acres within the Service Area (“Property”) requested an exemption from the Pre-Annexation Agreement requirement. On June 27, 2018, the Board of Directors held a meeting to discuss, among other things, the requested

exemption for the Property. During the meeting, the Board of Directors voted to grant the requested exemption and adopted Resolution No. 18-003 (“Resolution No. 18-003”) to memorialize that decision. A true and correct copy of Resolution No. 18-003 is attached hereto as Exhibit D. The City did not object.

32. On March 11, 2019, a then-contract purchaser of certain real property within the Service Area (“Development”) also requested an exemption from the Pre-Annexation Agreement requirement. A true and correct copy of the request is attached hereto as Exhibit E. On May 22, 2019, the Board of Directors held a meeting to discuss, among other things, the requested exemption for the Development. The owner of the Development wishes to proceed with developing the property as soon as possible. *See id.*

33. The Board and the City have engaged in extensive discussions regarding the Board’s intention to abandon the Pre-Annexation Agreement policy. The City opposes the Board’s position and has directed the Board to maintain the Pre-Annexation Agreement policy.

34. The City’s position runs contrary to its prior representations and its own understanding of the Board’s authority and scope. As noted, the City and Mayor adopted the Comprehensive Plan. The Comprehensive Plan acknowledges that “Only the Board of Public Works can implement recommendations related to

electricity, stormwater management, drinking water, and wastewater in Lewes.” Ex. A, p. 14.

35. Despite being aware of the Board’s concerns, and the reasons therefor, and the owner of the Development’s challenge to the enforceability of the Pre-Annexation Agreement requirement, and without offering any analysis or rationale contrary to the City Solicitor’s October 27, 2016 memorandum that would otherwise support the enforceability of the Pre-Annexation Agreement condition, on June 24, 2019, the City adopted a Resolution of the Mayor and City Council of the City of Lewes, Delaware, Directing the Board of Public Works of the City of Lewes to Require Annexation or an Executed Pre-Annexation Agreement as a Prerequisite to Providing Utility Services (“June 24 Resolution”). A true and correct copy of the June 24 Resolution is attached hereto as Exhibit F. In the June 24 Resolution, the Mayor and the City, among other things, chose to “direct that the Board of Public Works shall not provide utility services, including water and sewer to areas beyond the City limits unless the applicant for such services has first annexed the property into the City or executed a Pre-Annexation Agreement with the City of Lewes.” *Id.* at p. 3.

36. Also on June 24, 2019, the City adopted “An Ordinance to Amend Chapter 191, Water and Sewer Connections, Article I, Water Meters; Article II, Sewer Lateral Installation, Maintenance and Repair, of the Municipal Code of the

City of Lewes, Delaware by Amending Sections 191-2 and 191-12 Relating to Annexation and Water and Sewer Connections” (“June 24 Ordinance”). A true and correct copy of the June 24 Ordinance is attached hereto as Exhibit G. The June 24 Ordinance amended the Lewes municipal code to codify the Pre-Annexation Agreement policy as City law.

37. On June 26, 2019, the Board held a meeting of its Board of Directors to discuss, among other things, the June 24 Resolution and the June 24 Ordinance. During the meeting, the Board unanimously rejected the City’s authority to adopt the June 24 Resolution and the June 24 Ordinance.

38. In July 2019, counsel for the City and the Board exchanged a series of emails relating to this dispute. Counsel agreed by email to jointly submit this dispute to the Court for resolution. Ex. H. Counsel for the City even said that authority was given for the City’s counsel to draft the lawsuit to initiate the proceedings that the Board ended up initiating first by filing the action *sub judice*. *Id.* Despite this agreement, the City now proposes to move to dismiss this action on the basis that the Board lacks the authority to self-govern.

39. The City lacks authority to direct or control the Board’s actions. As noted above, the General Assembly vested in the Board – not the City – the authority to adopt such rules and regulations as are necessary to provide utility services within the Service Area. The decision whether to abandon the Pre-Annexation Agreement

policy is entirely within the judgment of the Board. The City's efforts to direct or control the Board's activities violates the Board's grant of authority by the General Assembly.

### **COUNT I – DECLARATORY JUDGMENT**

40. Plaintiff repeats and realleges the foregoing allegations.

41. There is an actual case or controversy as between the Board and the City with respect to the City's authority to compel the Board to enforce the Pre-Annexation Agreement policy outlined in Resolution Nos. 07-002 and 13-004.

42. As a result, the Board seeks the following declarations:

(a) The City lacks authority to direct and control the Board except where specifically authorized in the Board's Charter;

(b) The City lacks authority to direct and control the Board with respect to the enforcement of Resolution Nos. 07-002 and 13-004;

(c) The City lacks authority to enforce Resolution Nos. 07-002 and 13-004 or to otherwise enforce the Pre-Annexation Agreement policy;

(d) The Pre-Annexation Agreement policy as outlined in Resolution Nos. 07-002 and 13-004 is unenforceable; and

(e) The City is not entitled to any relief from the Board for the Board's refusal to enforce Resolution Nos. 07-002 and 13-004.

WHEREFORE, Plaintiff, the Board of Public Works of the City of Lewes, respectfully requests that this Court:

1. Enter an order stating the declarations listed in Count I;
2. Grant such other and further relief as the Court deems just and proper.

FOX ROTHSCHILD LLP

Of Counsel:

Michael J. Hoffmann  
Tarabicos Grosso, LLP  
One Corporate Commons  
100 W. Commons Blvd., Suite 415  
New Castle, DE  
Telephone: (302) 757-7811  
mike@tarabicosgrosso.com

/s/ Sidney S. Liebesman  
Sidney S. Liebesman (Bar No. 3702)  
E. Chaney Hall (Bar No. 5491)  
Citizens Bank Center  
919 N. Market St., Suite 300  
Wilmington, DE 19801  
Telephone: (302) 654-7444  
sliebesman@foxrothschild.com  
chall@foxrothschild.com

*Attorneys for Plaintiff the Board of  
Public Works of the City of Lewes*

Dated: August 29, 2019